No. 47941-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES KELLY,

Appellant,

v.

CAVALRY PORTFOLIO SERVICES, LLC,

Respondent.

On Appeal from Clark County Superior Court
No. 15-2-01097-6

BRIEF OF APPELLANT JAMES KELLY

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I. INTRODUCTION

Appellant ("James Kelly"), appeals the trial court's dismissal of his Consumer Protection Act claims against Cavalry Portfolio Services, LLC ("Respondent"), because the trial court committed clear errors of law.

Our State Supreme Court has already ruled that collection notices can be "deceptive," and violate Washington's Consumer Protection Act (CPA), even if those notices attempt to collect a valid debt and do not contain any factual misrepresentations.[1] The *only* requirement for a collection notice to violate Washington's CPA is that the conduct must have the "capacity to deceive a substantial portion of the population."[2] Whether conduct has the capacity to deceive a substantial portion of the population is a question of fact for a jury to decide.[3]

In this case, the Respondent admits mailing Mr. Kelly a collection letter falsely stating that "Cavalry Investments" purchased Mr. Kelly's old credit card account from Bank of America. Respondent admits that the collection letter demands that Mr. Kelly pay the "Cavalry Investments" debt to Respondent. However, Respondent later admitted under oath that "Cavalry Investments" *never* owned Mr. Kelly's debt. Respondent admitted under oath that the letter was sent to Mr. Kelly by "mistake."

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[1] *Panag v. Farmers Ins. Co.* of Wash., 166 Wn.2d 27, 50, 204 P.3d 885, 895 (2009).
[2] *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).
[3] *Behnke v. Ahrens*, 172 Wn.App. 281, 292, 294 P.3d 729, 735 (2012).

(CP 36). More importantly, Respondent admits that Mr. Kelly's debt was purchased along with "tens of thousands" of other accounts (CP 44).

If the *Panag* Court found that factually true collection notices can have the capacity to deceive a substantial portion of the population, then it is axiomatic that admittedly false collection notices have the capacity to deceive a substantial portion of the population. As a result, Respondent's admittedly false collection notices which name the wrong company as the purchaser/owner of accounts, borders on a *per se* violation of Washington's CPA. This is especially true where Respondent's conduct likely affected "tens of thousands" of other consumers.

Nevertheless, Respondent moved the trial court for Judgment on the Pleadings and a dismissal of Mr. Kelly's claims. Essentially, Respondent's defense was that the deceptive conduct was a "mistake" and was not "material" enough for the trial court to waste its time. Surprisingly, the trial court obliged Respondent and dismissed with prejudice Mr. Kelly's lawsuit in its entirety. However, in so doing, the Court committed glaring errors of law. Therefore, this Court should reverse the trial court's order and remand this matter to the trial court for further proceedings.

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II. ASSIGNMENTS OF ERROR

1. Did the trial court err by determining as a matter of law that Respondent's conduct did not have the *capacity to deceive a substantial portion of the public*?

2. Did the trial court err as a matter of law when it applied the Fair Debt Collection Practices Act's "Bona Fide Error" defense to this Consumer Protection Act case?

3. Did the trial court err as a matter of law when it applied the "unintentional" or "good faith" exception to Respondent's "deceptive" conduct?

III. STATEMENT OF THE CASE

Respondent has been sued over 800 times in federal court alone for unfair and/or deceptive collection practices. Respondent is a collection agency that collects debts for Cavalry Investments, among other companies. (CP 70). Cavalry Investments is a large national debt buyer that purchases old charged off consumer debts for pennies on the dollar and then turns those debts into profit by attempting to collect the full amount of the debts, plus accrued interest, penalties and fees.

In this case, Respondent mailed a deceptive collection letter to Mr. Kelly, and likely "tens of thousands" of other consumers. The collection letter stated that "Cavalry Investments, LLC" purchased Mr. Kelly's old Bank of America credit card account, and that Respondent was collecting the debt on behalf of "Cavalry Investments, LLC." The collection letter

demanded that Mr. Kelly pay Respondent for the account that was allegedly purchased/owned by "Cavalry Investments, LLC." *Ibid.*

Respondent later admitted under oath in a State Court sanctions proceeding that "Cavalry Investments, LLC" *never* owned Mr. Kelly's account, that the collection letter sent to Mr. Kelly was a "mistake," and that Mr. Kelly's account was purchased along with "tens of thousands" of other consumer accounts by another entity (CP 44). When Mr. Kelly alleged in his complaint that Respondent mailed deceptive collection letters to him and the other "tens of thousands" of consumers involved, rather than denying the allegation, Respondent desperately sought dismissal of Mr. Kelly's claims.

Respondent admitted in its Answer that the letter "erroneously identified which Cavalry affiliate had purchased Kelly's debt." (CP 70). To this day, Respondent has *never* denied mailing similar deceptive collection letters to the other "tens of thousands" of consumers involved.

Instead, Respondent asserted that the deceptive collection letter was a "mistake," but not "material" enough for to be truly "deceptive." Respondent begged the trial court to unilaterally determine as a matter of law that Respondent's actions were neither unfair nor deceptive.

Unfortunately, the trial court agreed with Respondent's misapplication of the law and summarily dismissed Mr. Kelly's claims

before he had a chance to advocate for the "tens of thousands" of other similarly situated consumers. However, in dismissing the case, the trial court committed clear errors of law, which can be gleaned from the following statements from the trial court:

> And so does it matter - - is it deceptive for Portfolio, LLC, Cavalry Portfolio, LLC, was it deceptive to your client that they listed the new - - it was purchased by Cavalry Investments, LLC. How is that deceptive? (RP 14). ...That was my question. How did this deceive him? (RP 15). ...Well, the second letter wasn't deceptive. The second letter was accurate. The first one would be your only argument for deception because that's the only one that listed a mistake. Cavalry Investments, LLC did not own it, and I've got to tell you having the same first name in all of these LLCs and then following it up with some code numbers, that problematic, but that's the way they run their business. So that's what I keep coming back to in my mind is how was he deceived by this letter? (RP 15-16).

The trial court then concluded:

> Thank you very much. I am going to grant the motion as a matter of law an unintentional and bonafide error, and does not result, in this case, in a deceptive or unfair act. I just cannot find any basis to support the claim against Cavalry Portfolio, LLC based on a letter that they sent January 9, 2012, when all -- all in this letter is accurate and correct except for the error in listing that it was purchased by Cavalry Investments, LLC when, in fact, it was purchased by Cavalry SPV I, LLC. Not a real significant difference in my mind to the party who – Mr. Kelly, and so I'll grant your motion. (RP 20).

Given the above, the trial court clearly concerned itself only with whether "Mr. Kelly" was in fact deceived by Respondent's erroneous collection letter, or whether "Mr. Kelly" should have been so deceived. However, that is not the proper inquiry under the CPA, especially in a matter that could potentially affect "tens of thousands" of consumers.

The proper inquiry under Washington's CPA is whether Respondent's deceptive collection letters "had the capacity to deceive a substantial portion of the public." More importantly, trial courts do not have the privilege of deciding as a matter of law whether an act or practice has the capacity to deceive a substantial portion of the public. That is a question of fact reserved for the jury.

Moreover, the "Bona Fide Error" defense cited by the trial court is an affirmative defense applicable *only* to a specific federal statute that was not even pled in this case. No Washington Court has ever applied the Bona Fide Error defense to a Consumer Protection Act lawsuit.

Finally, the trial court erroneously applied the "good faith" or "unintentional" exception because Washington's CPA does not even have an "intent" element. All that is required is a "capacity to deceive a substantial portion of the population." And, the "good faith" exception to Washington's CPA has never been applied to "deceptive" practices. The exception is reserved exclusively for "unfair" practices.

Therefore, the trial court's dismissal rests entirely upon three clear errors of law and should be reversed to avoid a potential injustice affecting thousands of consumers.

IV. ARGUMENT

A. Standard of Review.

Whether an act has the capacity to deceive a substantial portion of the public is a question of fact. *Behnke v. Ahrens*, 172 Wn.App. 281, 292, 294 P.3d 729 (2012). Appellate Courts review CR 12(c) Dismissals of Consumer Protection Act complaints de novo. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wn.2d 421, 442, 228 P.3d 1260 (2010); *Svendsen v. Stock*, 143 Wn.2d 546, 553, 23 P.3d 455 (2001).

B. FIRST ASSIGNMENT OF ERROR:

1. Whether Respondent's Conduct Had the "Capacity to Deceive a Substantial Portion of the Public" in Violation of Washington's Consumer Protection Act, was a Question of Fact that the Trial Court did not have the Authority to decide as a Matter of Law.

Washington's Consumer Protection Act (hereinafter "CPA") prohibits "deceptive" business acts or practices occurring in trade or commerce. RCW 19.86.020. The CPA is a broad, remedial statute that must be liberally construed to protect consumers, not narrowly construed to benefit debt collectors that have been sued over 800 times for unfair/

deceptive collection practices. RCW 19.86.920. The CPA intentionally uses ambiguous and undefined terms like "unfair" and "deceptive," to encourage consumers to use the statute as a tool to protect against a broad range of abusive business practices. *See, Lightfoot v. MacDonald,* 86 Wash.2d 331, 335-36, 544 P.2d 88 (1976) (holding: Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce.).

To prevail on a CPA action, the plaintiff must prove an "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." See, *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 782, 295 P.3d 1179 (2013)(citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

In *Klem,* Washington's Supreme Court thoroughly reviews cases interpreting the first two elements of the *Hangman Ridge* test, and conducts an extensive analysis of the language "unfair or deceptive act or practice" found in Washington's CPA. That Court states that it noted in a prior case, *Saunders:* [4]

> [b]ecause the act does not define 'unfair' or 'deceptive,' this court has allowed the definitions to evolve through a 'gradual process of judicial inclusion and exclusion. '

[4] *Saunders v. Lloyd's of London,* 113 Wn.2d 330, 344, 779 P.2d 249 (1989).

> *Saunders*, 113 Wn.2d at 344 (quoting *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972), *modified in Hangman Ridge*, 105 Wn.2d at 786).

Klem, 176 Wn.2d at 775. *Klem* goes on to state:

> That "gradual process of judicial inclusion and exclusion" has continued to take place in cases that, properly, did not read *Hangman Ridge* as establishing the only ways the first two elements could be met. *(citations omitted)*.

Id. The *Klem* Court further observes:

> Any doubt should have been put to rest in *Panag v. Farmers Ins. Co.* of Wash., 166 Wn.2d 27, 48, 204 P.3d 885 (2009), where we discussed both per se and unregulated unfair or deceptive acts. The primary issue in *Panag* was whether a collection agency that used deceptive mailers could be liable to debtors. *Id.* at 34. We quoted with approval language from the congressional record on the federal consumer protection act:
>
> 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country.'

Id. at 776 (citing *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J., dissenting) (quoting H.R. CONF. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914))).

In a summary holding, the *Klem* Court finally states:

> To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

Klem v. Washington Mutual Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

In *Panag*, a pivotal CPA case involving collection abuses that were very similar to the case at bar, the Supreme Court held:

> The CPA is a particularly appropriate vehicle for reaching the collection practices at issue. By broadly prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce," RCW 19.86.020, the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation. The deceptive use of traditional debt collection methods to induce someone to remand payment of an alleged debt is precisely the kind of "inventive" unfair and deceptive activity the CPA was intended to reach.

See, *Panag v. Farmers Ins. Co. of Washington,* 166 Wn.2d 27, 49, 204 P.3d 885, 895 (2009).

In *Panag*, collection notices were mailed to Washington Consumers. The consumers actually owed the debts, and the correct balances and the correct owner of the debts were accurately listed in those

collection notices. However, the State Supreme Court found that the collection notices were "deceptive" because they falsely *implied* that the debts were liquidated obligations. *Id.*, at 50.

In this case, Respondent readily admits that the collection notices contained false allegations. Respondent admits to falsely alleging that the wrong company purchased/owned the debts. (CP 36). Respondent admits to demanding payment on behalf of the wrong purchaser/owner. Mr. Kelly alleges that this same mistake likely affected "tens of thousands" of other consumers.

The trial court agreed that Respondent falsely named the wrong company in the collection notices. But then, the trial court inexplicably dismissed the case outright.

If the Supreme Court found that factually true collection notices can have the capacity to deceive a substantial portion of the population, then it is axiomatic that admittedly false collection notices have the capacity to deceive a substantial portion of the population. Therefore, to support the bizarre outcome in this case, the trial court limited its inquiry to whether "Mr. Kelly" was in fact deceived, and whether "Mr. Kelly" should have been deceived by Respondent's admittedly false statements.

The trial court *never* inquired whether Respondent's false statements had the capacity to deceive a substantial portion of the

population. Doing so would have resulted in the obvious conclusion that the trial court did not have the authority to answer such a question because whether an act has the capacity to deceive a substantial portion of the population is a question of fact that the trial court lacked the authority to answer in a 12(c) hearing.

The trial court then summarily determined that the admittedly false notices simply were not "deceptive" and dismissed Plaintiff's complaint, stating:

> I just cannot find any basis to support the claim against Cavalry Portfolio, LLC based on a letter that they sent January 9, 2012, when [the] letter is accurate and correct except for the error in listing that it was purchased by Cavalry Investments, LLC when, in fact, it was purchased by Cavalry SPV I, LLC. Not a real significant difference in my mind[.]

(RP 20). However, again, the trial court lacked the authority to decide out-of-hand that Respondent's admittedly false statements *did not* have the capacity to deceive a substantial portion of the population. And, limiting the query to how this matter affected only Mr. Kelly was a misapplication of the governing statute, especially where Mr. Kelly has alleged that this case potentially affects "tens of thousands" of other consumers. Therefore, this Court should reverse the trial court's decision and remand this matter back to the trial court for further adjudication.

2. Respondent's Conduct was in Fact "Deceptive."

Identifying the true owner of a purchased account is the most important part of the collection process. *See*, RCW 4.08.080. The reason for the rule is to prevent the consumer from being harassed by multiple suits on the same claim, or being subjected to multiple liability on the same claim. *Ingle v. Ingle*, 183 Wash. 234, 237-38, 48 P.2d 576 (1935). As a result, the party seeking to enforce an assigned account, has the burden of establishing its standing by proving its right to sue as a matter of law. *See, MRC Receivables Corp. v. Zion*, 102609 WACA, 60926-2-I (2009)(*citing*: *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

An assigned account is uncollectable if a third party collector cannot prove a valid chain of title leading to the collector as the real party in interest. As a result, if a collection notice misidentifies the owner of the account, no other facts contained in that collection notice are important. Proving a balance owed while not being able to prove who owns the balance is an exercise in futility because it cannot lead to a judgment.

That is exactly what happened in this case. The deceptive collection notice at issue in this case identified the wrong purchaser/owner of the account in its letter demanding payment. It was false. It was deceptive. And it undermined the debt collection lawsuit that Respondent

filed against Mr. Kelly. In fact, Mr. Kelly ultimately defeated Respondent's debt collection lawsuit because Respondent's deceptive debt collection letter cast doubt upon the true owner of the debt.

To now assert that the very same deceptive collection letter that undermined Respondent's lawsuit was *not* deceptive enough to constitute a violation of Washington's CPA is nonsense. Respondent's deceptive letter was enough to undermine Respondent's entire lawsuit, and was deceptive enough for Respondent to fly an employee from Arizona to Washington State to testify that Defendant had made a mistake in naming the wrong owner/purchaser of the debt in its letter to Mr. Kelly (CP 43).

The act of naming the wrong owner was not inconsequential to Defendant's lawsuit against Mr. Kelly and so it follows that it is certainly not inconsequential in this case. Defendant's act of mailing Mr. Kelly an "erroneous" collection letter is deceptive, and supports a CPA claim.

C. SECOND ASSIGNMENT OF ERROR:

It was an Error of Law for the Trial Court to Apply the "Bona Fide Error" Defense to this Case because the BFE is an Affirmative Defense to a Specific Federal Statute that was Never Pled in this Case.

The Bona Fide Error (BFE) defense is an affirmative defense applicable **only** to the Fair Debt Collection Practices Act (FDCPA). 15 U.S.C. § 1692k(c) (**emphasis added**). The affirmative defense is a two-pronged test that requires a defendant debt collector to affirmatively prove

by a preponderance of the evidence that 1) The violation was not intentional; and 2) The violation resulted from a Bona Fide Error notwithstanding the maintenance of procedures reasonably adapted to avoid such error. 15 U.S.C. § 1692k(c).

The affirmative defense is not applicable to this case for four important reasons. First, Mr. Kelly's complaint does not plead an FDCPA claim. Mr. Kelly's claim alleges one cause of action; a Washington Consumer Protection Act violation, to which the BFE defense does not apply.

Second, Respondent did not introduce any evidence suggesting that the error was not intentional. As the BFE is an affirmative defense, the fact that Respondent produced no admissible evidence even suggesting that the error was not intentional means that Respondent failed to affirmatively prove the very first prong of the two-part BFE test.

Third, affirmatively proving the BFE defense requires the collector to *admit* that an FDCPA *violation* actually *occurred*, despite maintenance of procedures reasonable adapted to avoid the error. Respondent does not agree that an FDCPA violation occurred. To the contrary, Respondent vigorously argues that an FDCPA violation *did not* occur in this case. Therefore, Respondent cannot assert the BFE defense.

Fourth and finally, to affirmatively prove by a preponderance of the evidence that the FDCPA violation occurred despite the maintenance

of procedures reasonably adapted to avoid the FDCPA violation, Respondent was required to produce at least some evidence regarding Respondent's maintenance of the alleged reasonable procedures.

However, because the case was dismissed pursuant to a CR 12(c) Motion, the record is devoid of *any* evidence suggesting that Respondent maintains *any* procedures whatsoever, much less proving by a preponderance of the evidence that Respondent maintains procedures reasonably adapted to avoid the specific FDCPA violation at issue in this case.

Despite the above, the trial court stated in pertinent part: "**I am going to grant the motion as a matter of law an unintentional and bona fide error, and does not result, in this case, in a deceptive or unfair act**." (RP 20) (**Emphasis added**).

Given the above, there was simply no basis in law or fact for the trial court to apply the FDCPA's Bona Fide Error defense to this Consumer Protection Act lawsuit. Therefore, this court should reverse the trial court and remand this case back to the trial court for further proceedings.

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D. THRID ASSIGNMENT OF ERROR:

Even if the Trial Court's Characterization of Respondent's Deceptive Conduct as "Unintentional" Was Related to the Consumer Protection Act's "Good Faith" Defense, it was Still an Error of Law for the Trial Court to Apply the "Good Faith" Defense to Respondent's Deceptive Conduct.

Washington's Consumer Protection Act (CPA) is a broad, remedial statute that must be liberally construed to protect consumers, not narrowly construed to benefit debt collectors that have been sued over 800 times in federal courts alone. RCW 19.86.920. As a result, a debt collector's lack of intent is not a defense to engaging in deceptive collection practices that violate the CPA. In fact, intent is not even an element to a CPA claim. No intent is required to prove a CPA violation; only a tendency or capacity to deceive. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

Additionally, the CPA's "Good Faith" defense only applies to "unfair" practices, not "deceptive" conduct. *Watkins v. Peterson Enterp.*, 57 F.Supp.2d 1102, 1109–11 (E.D. Wash. 1999). In fact, no court has ever applied the "Good Faith" defense to a "deceptive" act.

Despite the fact that "intent" is not even an element of a CPA claim, the trial court stated in pertinent part: "**I am going to grant the motion as a matter of law an unintentional and bona fide error, and**

does not result, in this case, in a deceptive or unfair act." (RP 20) **(Emphasis added)**.

The trial court's order represents a clear error of law and should be reversed to avoid prejudice to Mr. Kelly and possibly "tens of thousands" of consumers (CP 44).

CONCLUSION

The trial court erred in concluding that Respondent had made an unintentional and bona fide error and in granting, as a matter of law, Respondent's Motion for Judgment on the Pleadings. Mr. Kelly therefore prays that this Court reverse the trial court's dismissal, remand this case back to the trial court for further proceedings, and award Mr. Kelly reasonable costs and attorney's fees associated with this appeal.[5]

RESPECTFULLY SUBMITTED this 15th day of February, 2016.

Robert Mitchell

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[5] RAP 18.1; *Sing v. John L. Scott, Inc.*, 83 Wn.App. 55, 75, 920 P.2d 589, (Wash.App. Div. 2 1996).

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Brief of Appellant James Kelly on the following named person(s), mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last known address(es) indicated below:

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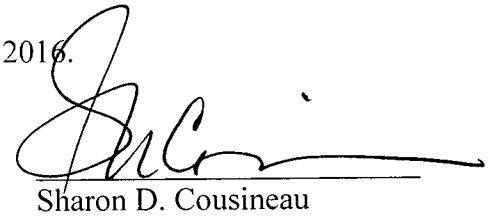
Dated this 15th day of February, 2016.



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